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Before the
COPYRIGHT ROYALTY JUDGES
Washington, D.C.

In the Matter of	)	
	)	
CRB Rulemaking	)	Docket No. 19-CRB-0014 RM
	)	
	)	

MULTIGROUP CLAIMANTS' RESPONSE TO REQUEST FOR COMMENTS ON CATEGORIZATION OF CLAIMS

In response to the Judges' *Notice of Inquiry Regarding Categorization of Claims for Cable or Satellite Royalty Funds and Treatment of Ineligible Claims*, 84 Fed. Reg. 71852 (Dec. 30, 2019), Multigroup Claimants responds as follows:

A. IDENTIFICATION OF THE ALLOCATION PHASE CATEGORIES.

For the reasons set forth in Multigroup Claimants' *Comments on Claimant Category Definitions and Proposed Modification, Docket nos.* 16-CRB-0009 CD (2014-17) and 16-CRB-0010 SD (2014-17) (April 19, 2019), advocate a modification of the currently defined category definitions.1

1 Attached hereto as **Exhibit A** are the category definitions *currently* utilized. Notwithstanding, the stipulated definition first utilized and appearing in **Exhibit A** is to "Joint Sports Claimants", not "sports programming", despite the fact that each

As set forth in Multigroup Claimants prior submission, inherently problematic to the claimant category definitions (that have been historically utilized) is the fact that they do not uniformly distinguish themselves by a *type* of programming. Certain definitions rely on a type of programming (e.g., devotional programming), whereas others rely on the *nationality* of the claimant (sports programming, Canadian claimant programming), or the *location* of the originating over-the-air broadcast (e.g., sports programming, Canadian claimant programming), or the commercial/non-commercial nature of the broadcaster, or a combination of the foregoing. Further, misnomers for the programming are interspersed, such as when "Canadian claimant programming" includes *any* non-U.S. copyright owner, e.g., European owners, rather than just Canadian claimants. Predictably, absurd distinctions result.

In fact, Multigroup Claimants and its predecessor IPG have represented entities from Canada, Europe and Asia, whose works are broadcast on both Canadian and U.S. stations. In order to be fully compensated for these works, such entities require the prosecution of claims in both the Canadian Claimants category

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and every public notice requesting claimants to identify their programming for the last several decades solicits comment whether the claimant is making claim in the "sports programming" category, not the "Joint Sports Claimants" category.

and Program Suppliers category for the *same* program being compensated exclusively for retransmissions in the U.S. seen exclusively by U.S. viewers. No differently, a non-U.S. owned sports programming broadcast that originates from Mexico, the U.S., and Canada, would be required to seek compensation from three different categories: the Mexican-originated broadcast from the Program Suppliers category; the U.S.-originated broadcast from the "sports programming" category; and the Canadian-originated broadcast from the Canadian Claimants Group.

As should be evident, the previously stipulated definition of "sports programming" was fashioned for the singular purpose of limiting the definition to the programming claimed by the handful of members of the Joint Sports Claimants. All too pleased to expand the definition of their own category, the beneficiaries of the narrowing definition – the Canadian Claimants Group and the Program Suppliers -- welcomed into their fold sports programming that did not meet the stringent definition set forth by the historically utilized criteria.

As historically stipulated, the "sports programming" claimant category comprises:

> "Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below."

See, e.g., **Exhibit A** (emphasis added).

In turn, the definition of the Canadian Claimants claimant category comprises:

> "All programs broadcast on Canadian television stations, except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) other programs owned by U.S. copyright owners."

Id.

Clearly, no inherent difference exists that would suggest that a "tape delayed" sports broadcast would be considered differently by a system operator than a "live" telecast, or even rebroadcast of a previously broadcast sporting event. What makes a "live" broadcast of a sporting event more "sporty" than a tape delayed broadcast? Clearly nothing, as it is the exact same content simply exhibited at a later time. As such, while the live broadcast is most certainly more valuable (a subject for the "Phase II"/Distribution proceedings) there is no logical basis for putting the re-broadcast of a taped sporting event in a different subject category than a re-broadcast of the same live sporting event.[2] Notwithstanding, any tape delayed

2 For years, Notre Dame University syndicated its Saturday football game broadcasts for viewing across the U.S. on Sunday. To suggest that there was some change of character because it was seen a day later than its initial live broadcast, ignores the reality that resulted in the syndication of such programming.

broadcast or rebroadcast of sports programming is rejected from the "sports programming" category.

No inherent difference exists that would suggest that non-college amateur sports would be considered differently by a system operator than "professional and college" sports broadcast. Although dismissed for other reasons, the FIFA World Cup matches are generally regarded as drawing more viewership than any other sports broadcasts worldwide. Similarly, the Olympics and U.S. Olympic Trials generate significant viewership. Notwithstanding, in prior proceedings the Joint Sports Claimants challenged *all* of these as not being in the "sports programming" category, according to the definitions historically utilized.

No inherent difference exists that would suggest that broadcasts of *individual* sports (e.g., golf, ice skating, boxing) would be considered differently by a system operator than broadcasts of a "team" sport. Again, despite the obvious "sports" nature of such programming and the significant draw of such programming, such sports broadcasts are excluded from the sports programming category because of the arbitrarily narrow definition historically utilized.

No inherent difference exists that would suggest that a broadcast originating in Mexico (and retransmitted in the U.S. to U.S. viewers) would be considered different by a system operator than broadcasts of the identical program originating

from either the U.S. or Canada (and also retransmitted in the U.S. to U.S. viewers). Again, and despite the fact that Spanish-language programming originally broadcast in Mexico has grown exponentially in the U.S. retransmission market, such sports programming is automatically excluded from the "sports programming" claimant category. Into which Phase I/Allocation category such broadcast would land according to a strict reading of the historically utilized definitions is unclear, but such broadcasts have historically been placed in the catch-all Program Suppliers category.3

No inherent difference exists that would suggest that a broadcast of a "predominately sports nature" would be considered different than broadcasts according the historically utilized "sports programming" definition, as the audience is exactly the same. Obviously, the equivalent of either a sports highlights show or a program such as ESPN Sportscenter appeals to the identical audience as are

3 The "Program Suppliers" definition includes "syndicated series, specials and movies, other than Devotional Claimants programs". See **Exhibit A**. Nonetheless, the subsequent definition thereof includes, *inter alia*, a broader inclusion of "programs licensed to and broadcast by at least one U.S. commercial television station during the calendar year in question." Such definition would evidently include programs falling under the "Joint Sports Claimants" definition and multiple other categories, yet unlike the reference to "Devotional Claimants", no comparable reference to the "Joint Sports Claimants" definition or the other categories appears.

watching sports broadcasts falling under the definition historically utilized for "sports programming".4

Finally, the fact that the "sports programming" category is itself defined by reference to the Canadian Claimants category, and that category actually *names specific copyright owner claimants* within its definition, resoundingly demonstrates that such claimant category was not defined according to any perceived difference in perception by system operators, but rather by the desires of the Joint Sports Claimants to narrow its definition to only such programming as may include its members.

As was also addressed in Multigroup Claimants' *Comments on Claimant Category Definitions and Proposed Modification***,** to the knowledge of Multigroup Claimants, no information or study has ever been presented in allocation or distribution proceedings which demonstrates that system operators select programming according to the criteria that differentiates the narrower definition of "sports programming" from what is more generally understood to be "sports programming". If such information or study existed, *then* the discriminating

4 Multigroup Claimants realizes that ESPN Sportscenter is a cable delivered program that is not the subject of an over-the-air rebroadcast, but uses such program just to demonstrate its point as to similarly structured programs appearing on over-the-air stations.

criteria infused into the historically utilized "sports programming" definition could be rationalized. In the absence of any such information or data, however, the definition historically utilized is revealed for what it is, a self-serving definition structured to impede any Phase II/Distribution sports programming claims.

As Multigroup Claimants understands, one purpose of the *Notice of Inquiry* is to discern whether any information or study exists, i.e., facts, which demonstrates that system operators select programming according to the criteria that differentiates the narrower definition of "sports programming". Multigroup Claimants is at a disadvantage from the standpoint that it has never been a participant in Phase I/Allocation proceedings. Notwithstanding, from its reading of the public record there is no indication that the studies relied on for Phase I/Allocation determinations ever addressed such subject, as opposed to simply submitting to system operator surveys based on the stipulated definitions appearing at **Exhibit A**.

1. Multigroup Claimants' proposed category definitions.

Of course, and until Multigroup Claimants sees any submission of information, it cannot comment further, other than to address the inherent arbitrariness of the existing definitions which, on their face, generate a multitude of

counterintuitive results. Presuming that no such data will be presented, i.e., data demonstrating that system operators do not simply discriminate their selection of retransmitted broadcast programming according to program types, but rather discriminate in their selection of producer's *nationality*, the *location* of the originating over-the-air broadcast, the "amateur" versus "professional" nature of sports programming, the "individual" versus "team" sport nature of sports programming, or whether a program is "live", "recorded", "tape-delayed", a "first-run" versus "re-run" or "re-broadcast" of programming, etc., Multigroup Claimants rejects such distinctions, and rejects any category definition which *names specific copyright owner claimants* within its definition. All such programming can already be evaluated according to Phase II/distribution criteria, and Multigroup Claimants proposes the category definitions set forth in the attached **Exhibit B**.

A redline version showing the distinctions between the historically utilized definitions, and Multigroup Claimants' proposed definitions appears herein as **Exhibit C**.

2. Impact on the cost and efficiency of distribution proceedings.

Multigroup Claimants can discern no detrimental impact on the cost or efficiency of the distribution proceedings, and a consequent benefit. In each and every Phase II/distribution proceeding with which Multigroup Claimants or its

predecessors have participated, data utilized by it and all other parties have not been restricted to include only data conforming to particular category definitions. Rather, data of the whole of the broadcast panoply is secured, then culled down to only include data relating to particular category definitions. In the identical manner in which data has previously been culled down to apply to only a particular category, it would be culled down to apply to any newly-defined categories. Consequently, there would be no change in Phase II/distribution proceedings other than that the process of culling would be extraordinarily streamlined and simplified.5

Nor does Multigroup Claimants consider there to be any impact on the cost or efficiency of data submitted in Phase I/allocation proceedings. To Multigroup Claimants' knowledge, the only study that has been submitted to the Judges or their predecessors that does not rely on industry-wide data was the Bortz Survey, which surveys system operators according to the category definitions provided by the Joint Sports Claimants. However, for the proponents of the Bortz Survey to purposely exclude programming that is undeniably of a "predominately sports nature", and

5 For example, it is no small task to first analyze the program type from available broadcast data, and then distinguish whether certain programming is "live" or a "re-broadcast", its broadcast origin, the nationality of the producer, etc.

require system operators to distinguish between categories that they have not themselves articulated, becomes a self-fulfilling means to prop up the artificial definitions. It does not, however, make such distinctions valid.

3. Impact on the likelihood of achieving settlements to resolve both Allocation Phase and Distribution Phase controversies.

The primary benefit of adopting the proposed category definitions will be to add a semblance of logic and clarity to the categorization of programs. Multigroup Claimants has not been involved in the Phase I/Allocation proceedings, but cannot see how the shifting of programming into one or another definition will have any effect upon settlements.

As regards Phase II/Distribution proceedings, the clarity of definitions to which no one objects (e.g., devotional category) has had zero influence on the likelihood of achieving settlements. In only a handful of circumstances has there been disagreement as to program categorization, and in each instance, all parties have submitted reasoned arguments and evidence advocating their position. In the experience of Multigroup Claimants and its predecessors, rulings have been both in favor of and against their asserted categorizations. Logically, therefor, Multigroup Claimants does not anticipate the clarity of definitions to affect the likelihood of achieving settlements.

B. PROPOSED REVISIONS TO 37 C.F.R. part 351.

In the *Notice of Inquiry*, the Judges requested proposed revisions to 37 C.F.R. part 351. Such subpart of the CRB regulations generally addresses the proceedings before the Judges, and at Section 351.1, the filing of petitions to participate and identification of the claimant categories in which a participant intends to participate.

Multigroup Claimants notes that the U.S. broadcast, cable, and satellite television industries have transformed immensely since institution of the cable and satellite retransmission royalty proceedings, in manners that could not have been reasonably foreseen, and may change further. Multigroup Claimants also recognizes that while valid bases may exist for the creation of newly-defined categories, in order to satisfy the criteria for distribution, whether by the splintering or combination of categories, at any such time there may not be a participant whom is sufficiently affected as to create a need to re-define existing categories.6

6 Multigroup Claimants and its predecessors have long advocated that the extraordinary growth in Spanish-language programming within the United States, relative to English-language programming, would warrant a separate category for Spanish-language programming, particularly in light of its distinct (and often mutually exclusive) audience from English-language programming. Such widely-acknowledged reality would likely be reflected in the decisions of cable and

Notwithstanding, were such definitions originally analyzed in connection with the issue for which they were ostensibly created, i.e., the decisions of system operators as to why they select to retransmit one broadcast station versus another, and not simply acceding to stipulations amongst Phase I participants, then the current Phase I definitions would have been exposed as having been created for the purpose of narrowing certain categories to only the programming claimed by certain claimants, and expanding other categories to be as broad as possible. Edifying the desires of particular copyright owners, however, has never been a legitimate reason for imposing the claimant category definitions.

Therefore, in order to maintain the greatest amount of flexibility with the current system, while maintaining the legitimacy of imposing definitions that are designed to identify the decisions of system operators as to why they select to retransmit one broadcast station versus another (and not artificially created to benefit or harm certain copyright owners), Multigroup Claimants proposes nominal revisions to the existing regulations. Specifically, the following:

Subpart 351.1 (a) is proposed to read as follows:

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satellite system operators, when determining which broadcast stations they elect to retransmit. Notwithstanding, and while representing significant Spanish-language programming, Multigroup Claimants has no current desire to prosecute such distinction and create a separate Spanish-language programming category.

> *Notice of commencement; solicitation of petitions to participate.* All proceedings before the Copyright Royalty Judges to make determinations and adjustments of reasonable terms and rates of royalty payments, and to authorize the distribution of royalty fees, shall be initiated by publication in the Federal Register of a notice of the initiation of proceedings calling for the filing of petitions to participate in the proceeding. **For distribution proceedings, the published notice shall identify the categorical definitions of claims or groups of copyright owners that the Copyright Royalty Judges last applied.**

Subpart (b)(2)(i)(B) (relating to single petitions) is proposed to read as follows:

> (B) In a cable or satellite royalty distribution proceeding, identification of whether the petition covers a Phase I proceeding (the initial part of a distribution proceeding where royalties are divided among the categories or groups of copyright owners), a Phase II proceeding (where the money allotted to each category is subdivided among the various copyright owners within that category), or both. **In the event that any participant proposes use of a category of claims that is different than that most recently applied, as identified in the notice of initiation of proceedings, such participant shall include in its petition the proposed category definitions, and an explanation for the basis of such proposal, to which the Judges may elect whether a reasoned basis exists for requesting further information from the other participants, or may adopt without further soliciting comment**; and

Subpart (b)(2)(i)(B) (relating to joint petitions) is proposed to read as follows:

(C) In a cable or satellite royalty distribution proceeding, identification of whether the petition covers a Phase I proceeding (the initial part of a distribution proceeding where royalties are divided among the categories or groups of copyright owners), a Phase II proceeding (where the money allotted to each category is subdivided among the various copyright owners within that category), or both. **In the event that any participant proposes use of a category of claims that is different than that most recently applied, as identified in the notice of initiation of proceedings, such participant shall include in its petition the proposed category definitions, and an explanation for the basis of such proposal, to which the Judges may elect whether a reasoned basis exists for requesting further information from the other participants, or may adopt without further soliciting comment**;

Respectfully submitted,

Dated: March 15, 2020

_____/s/_____

Brian D. Boydston, Esq.
California State Bar No. 155614

PICK & BOYDSTON, LLP
2288 Westwood Blvd., Ste. 212
Los Angeles, California 90064
Telephone: (424)293-0111
Facsimile: (213)624-9073
Email: brianb@ix.netcom.com

Attorneys for Multigroup Claimants

EXHIBIT A

Historically used Phase I category definitions

"Program Suppliers." Syndicated series, specials and movies, other than Devotional Claimants programs as defined below. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television stations during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, "PM Magazine," and locally hosted movie shows.

"Joint Sports Claimants." Live telecasts of professional and college team sports broadcast by U.S. and Canadian television stations, except for programs coming within the Canadian Claimants category as defined below.

"Commercial Television Claimants." Programs produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question and not coming within the exception described in subpart 3) of the "Program Suppliers" definition.

"Public Broadcasting." All programs broadcast on U.S. noncommercial educational television stations.

"Devotional Claimants." Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.

"Canadian Claimants." All programs broadcast on Canadian television stations, except (1) live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports, and (2) other programs owned by U.S. copyright owners.

"Music Claimants." Musical works performed during programs that are in the following categories: Program Suppliers, Joint Sports, Commercial Television Claimants, Public Television Claimants, Devotional Claimants, and Canadian Claimants.

"National Public Radio." All non-music programs that are broadcast on NPR Member Stations.

EXHIBIT B

Proposed Phase I category definitions

"Program Suppliers." Syndicated series, specials and movies, except those programs that fall within the program types set forth below. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television stations during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S commercial television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, and locally hosted movie shows.

"Sports Programming." Broadcasts of a predominately sports nature, except those programs that fall within the Commercial Television definition.

"Commercial Television." Programs produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question, including programs of a predominately sports nature, and excluding programming coming within the Program Suppliers category definition.

"Public Television." All programs broadcast on U.S. noncommercial educational television stations.

"Devotional." Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.

"Canadian Broadcast." All programs broadcast on Canadian television stations, except (1) programs that fall within the Sports Programming program types, and (2) programs owned by U.S. copyright owners.

"Music." Musical works performed during programs that are in the following program type categories: Program Suppliers, Joint Sports, Commercial Television, Public Television, Devotional, and Canadian Broadcast.

"National Public Radio." All non-music programs that are broadcast on NPR Member Stations.

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EXHIBIT C

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~~Historically used~~Proposed Phase I category definitions

"Program Suppliers." Syndicated series, specials and movies, ~~other than Devotional Claimants~~except those programs ~~as defined~~that fall within the program types set forth below. Syndicated series and specials are defined as including (1) programs licensed to and broadcast by at least one U.S. commercial television stations during the calendar year in question, (2) programs produced by or for a broadcast station that are broadcast by two or more U.S commercial television stations during the calendar year in question, and (3) programs produced by or for a U.S. commercial television station that are comprised predominantly of syndicated elements, such as music video shows, cartoon shows, ~~"PM Magazine,"~~ and locally hosted movie shows.

"~~Joint~~ Sports ~~Claimants."~~ ~~Live telecasts~~Programming." Broadcasts of ~~professional and college team~~a predominately sports ~~broadcast by U.S. and Canadian television stations~~nature, except ~~for~~those programs ~~coming~~that fall within the ~~Canadian Claimants category as defined below.~~

~~"~~Commercial Television ~~Claimants."~~definition.

"Commercial Television." Programs produced by or for a U.S. commercial television station and broadcast only by that one station during the calendar year in question, including programs of a predominately sports nature, and ~~not~~excluding programming coming within the ~~exception described in subpart 3) of the "~~Program Suppliers~~"~~ category definition.

"Public ~~Broadcasting~~Television." All programs broadcast on U.S. noncommercial educational television stations.

"Devotional ~~Claimants~~." Syndicated programs of a primarily religious theme, not limited to those produced by or for religious institutions.

"Canadian ~~Claimants~~Broadcast." All programs broadcast on Canadian television stations, except (1) ~~live telecasts of Major League Baseball, National Hockey League, and U.S. college team sports~~programs that fall within the Sports Programming program types, and (2) ~~other~~ programs owned by U.S. copyright owners.

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Proof of Delivery

I hereby certify that on Sunday, March 15, 2020, I provided a true and correct copy of the MULTIGROUP CLAIMANTS' RESPONSE TO REQUEST FOR COMMENTS ON CATEGORIZATION OF CLAIMS to the following:

Commercial Television Claimants (CTV), represented by Ann Mace, served via Electronic Service at amace@crowell.com

Public Television Claimants (PTV), represented by Ronald G. Dove Jr., served via Electronic Service at rdove@cov.com

National Public Radio (NPR), represented by Gregory A Lewis, served via Electronic Service at glewis@npr.org

Canadian Claimants Group (CCG), represented by Lawrence K Satterfield, served via Electronic Service at lksatterfield@satterfield-pllc.com

Powell, David, represented by David Powell, served via Electronic Service at davidpowell008@yahoo.com

Broadcast Music, Inc. (BMI), represented by Jennifer T. Criss, served via Electronic Service at jennifer.criss@dbr.com

ASCAP, represented by Sam Mosenkis, served via Electronic Service at smosenkis@ascap.com

Devotional Claimants, represented by Matthew J MacLean, served via Electronic Service at matthew.maclean@pillsburylaw.com

SESAC Performing Rights, LLC, represented by John C. Beiter, served via Electronic Service at john@beiterlaw.com

Global Music Rights, LLC, represented by Scott A Zebrak, served via Electronic Service at scott@oandzlaw.com

Joint Sports Claimants (JSC), represented by Daniel A Cantor, served via Electronic Service at daniel.cantor@apks.com

MPA-Represented Program Suppliers, represented by Lucy H Plovnick, served via Electronic Service at lhp@msk.com

Major League Soccer, LLC (MLS), represented by Edward S. Hammerman, served via Electronic Service at ted@copyrightroyalties.com

National Association of Broadcasters (NAB), represented by Ann Mace, served via Electronic Service at amace@crowell.com

Signed: /s/ Brian D Boydston